

EMPLOYEE SERVICE DETERMINATION**M.A.N. – R.R.B. No. A-XXX-XX-8664**

This is the decision of the Railroad Retirement Board regarding whether the services performed by M.A.N. for Norfolk Southern Corporation (NS) constituted employee service under the Railroad Retirement Act (45 U.S.C. § 231 et seq. (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.) (RUIA). NS is a covered employer under those Acts.

In response to a coverage questionnaire regarding her contractor services for NS, M.A.N. provided information on November 14, 2006. M.A.N. stated that she is a former NS employee who took early retirement January 31, 2001 and "was asked if [she] would like to come in and work as a temp." She stated that she began work in the Intermodal Department on February 14, 2002 performing administrative services such as typing, filing, answering phones, etc. She also performed the same services for Strategic Planning. M.A.N. stated that she performed her services on NS property, using supplies and equipment furnished by NS, working five days a week, usually working an eight-hour day. M.A.N. was paid on a per-hour basis and submits semi-monthly invoices for the service she provides for each department.

Additionally, information was provided by Mr. Scott F. Wilkinson, Assistant General Tax Attorney for NS. Mr. Wilkinson stated that M.A.N. performs general administrative and clerical service to the Intermodal Department and also provides temporary services to Strategic Planning on several specific, long-term projects. According to Mr. Wilkinson, M.A.N. began providing services to the Intermodal Department in February 2002 and began providing services to Strategic Planning in April 2004. Mr. Wilkinson stated that M.A.N. retired from NS in January 2001. He stated that prior to her retirement, M.A.N. worked in the Intermodal Department as a secretary, but reported to different managers. He stated that "although there are some similarities between the work M.A.N. performed as an employee and the services she currently provides, M.A.N.'s current responsibilities are more narrowly defined in accordance with the underlying service contract." Mr. Wilkinson stated that M.A.N. provides "administrative services that support day-to-day operations." M.A.N. spends approximately 70 percent of her time on specific long-term projects and 30 percent of her time on general clerical and administrative support, according to Mr. Wilkinson. Mr. Wilkinson stated that M.A.N. renders her service in the NS offices using supplies and equipment provided by NS. M.A.N. is assigned work by two administrative coordinators who each assign a portion of their daily workloads to her, according to Mr. Wilkinson. Mr. Wilkinson stated that these coordinators

generally determine the order, sequence, and priority of the work and review M.A.N.'s completed assignments.

Section 1(b) of the Railroad Retirement Act and section 1(d)(1) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d) of the Railroad Retirement Act further defines an individual as "in the service of an employer" when:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * * *.

Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. §§ 3231(b) and (d)). While the regulations of the RRB generally merely restate this provision, it should be noted that section 203.3(b) thereof (20 CFR 203.3(b)) provides that the foregoing criteria apply irrespective of whether "the service is performed on a part-time basis * * *."

As the above definitions would indicate, the determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board will consider criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, we consider whether the individual is integrated into the employer's operations. The criteria utilized in an employee service determination are applied on a case-by-case basis, giving due consideration to the presence or absence of each element in reaching an appropriate conclusion with no single element being controlling. Because the holding in this type of determination is completely dependent upon the particular facts involved, each holding is limited to that set of facts and will not be automatically applied to any other case.

Under federal laws numerous factors are involved in determining whether an individual is engaged in employee service and in the absence of judicial authority directly interpreting the employee service provisions of the Railroad Retirement Act these factors may be useful in application of those provisions. A

few of these are particularly noteworthy in M.A.N.'s case. An individual may not be self-employed where the employer furnishes without charge the supplies and premises for the work. See Henry v. United States, 452 F. Supp. 253, 255 (E.D. Tenn., 1978). Payment on an hourly basis rather than at a specified amount per job also indicates that the individual is an employee. See Bonney Motor Express, Inc. v. United States, 206 F. Supp. 22, 26 (E.D. Va., 1962). An independent contractor offers service to the general public rather than to a specific employer. See May Freight Service, Inc. v. United States, 462 F. Supp. 503, 507 (E.D. N.Y., 1978). Similarly, an independent contractor generally may substitute another individual to perform the contract work, while an employee must perform the work himself. Gilmore v. United States, 443 F. Supp. 91, 97 (D. MD., 1977).

Applying the foregoing criteria to the facts of this case, the Board finds that M.A.N. is performing her services as an employee of NS. She works on the premises of NS and uses supplies and equipment furnished by NS. M.A.N. is paid on a per-hour basis and her work hours typically coincide with the work hours of employees in the Intermodal Department and Strategic Planning Department of NS. M.A.N. works on a day to day basis, and NS can tell her at any time not to come in to work again. The administrative work that M.A.N. now performs for NS includes typing, filing, and answering the telephone and is the same type of work she performed as an employee of NS.

It is the decision of the Board that M.A.N.'s services for NS are being performed as an employee of NS pursuant to section 1(d)(1)(i)(A) of the Railroad Retirement Act and the corresponding provision of the Railroad Unemployment Insurance Act. The Board therefore, finds that M.A.N.'s services are creditable under the RRA and RUIA. Services may be credited in accordance with section 211.16 of the Board's regulations (20 CFR 211.16).

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever